

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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FRANCISCO ALVAREZ, et al.,

Plaintiffs,

**U.S. DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
LONG ISLAND OFFICE**

-against-

ORDER

17-CV-4678 (JMA)(ARL)

FRAGRANCENET.COM., INC.,

Defendants.
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AZRACK, United States District Judge:

In an order issued by Magistrate Judge Arlene R. Lindsay on September 5, 2019 (the “Order”), Judge Lindsay granted the motion of plaintiffs’ counsel to withdraw from representing plaintiffs Francisco Alvarez (“Alvarez”) and Gladis Gillen (“Gillen”).

The Order explained that:

Matthew Berman (“Berman”), counsel for the plaintiffs, has detailed the difficulties his firm has faced with its representation of Alvarez and Gillen. Specifically, Berman avers that the firm has tried numerous times to contact and meet with Alvarez and Gillen in order to prepare a response to the defendant's discovery requests. Despite such attempts, counsel have been unable to reach Alvarez and Gillen. On July 24, 2019, counsel also sent Alvarez and Gillen letter indicating that they would not continue to represent them given their conduct. Despite such letter, Alvarez and Gillen have not responded.

(Order at 2.) The Order granted Alvarez and Gillen “30 days to obtain new counsel or indicate to the Court that they intend to proceed pro se” and warned them that “[f]ailure to do so may result in a Report and Recommendation to the District Judge that their claims be dismissed.” (Id. at 3.)

Copies of the Order were served on both Alvarez and Gillen. They did not contact the Court within 30 days and, to date, have not filed any papers with the Court.

On December 12, 2019, defendant filed a motion to dismiss both Alvarez and Gillen for disregarding the Order and failing to prosecute their claims. Alvarez and Gillen have not filed any response to this motion.

Federal Rule of Civil Procedure 41(b) provides, “[i]f the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it.” Fed. R. Civ. P. 41(b). The Second Circuit considers five principal factors when reviewing a district court’s order of dismissal for failure to prosecute:

(1) the duration of the plaintiff’s failures, (2) whether plaintiff had received notice that further delays would result in dismissal, (3) whether defendant is likely to be prejudiced by further delay, (4) whether the district judge has taken care to strike the balance between alleviating the court calendar congestion and protecting the party’s right to due process and a fair chance to be heard, and (5) whether the judge has adequately assessed the efficacy of lesser sanctions.

Shannon v. Gen. Elec. Co., 186 F.3d 186, 193–94 (2d Cir. 1999) (quoting Nita v. Conn. Dep’t of Env’tl. Prot., 16 F.3d 482, 485 (2d Cir. 1994)). Generally, no single factor is dispositive. Id. at 194.

Alvarez and Gillen have failed to respond to the Order and defendant’s motion to dismiss. Additionally, their earlier failures to prosecute this action are detailed in the Order that granted plaintiffs’ counsel’s request to withdraw. Judge Lindsay previously warned Alvarez and Gillen that failure to respond to her Order could result in the dismissal of the case. Their failures to comply with the Order and to prosecute this action warrant dismissal. Accordingly, the Court grants defendant’s motion to dismiss, (ECF No. 32), and dismisses the claims of Alvarez and Gillen, with prejudice, for failure to prosecute.

Defendant is directed to promptly mail a copy of this Order to Alvarez and Gillen and file proof of service on ECF.

SO ORDERED.

Dated: February 21, 2020
Central Islip, New York

 /s/ (JMA)
JOAN M. AZRACK
UNITED STATES DISTRICT JUDGE